



## FINAL REPORT



## GUANTANAMO REVIEW TASK FORCE



January 22, 2010



**Department of Justice**

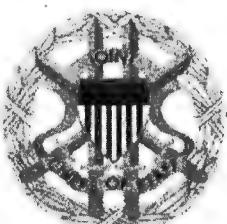
**Department of Defense**

**Department of State**

**Department of Homeland Security**

**Office of the Director  
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**Joint Chiefs of Staff**



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## **EXECUTIVE SUMMARY**

On January 22, 2009, the President issued Executive Order 13492, calling for a prompt and comprehensive interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base and requiring the closure of the detention facilities there. The Executive Order was based on the finding that the appropriate disposition of all individuals detained at Guantanamo would further the national security and foreign policy interests of the United States and the interests of justice.

One year after the issuance of the Executive Order, the review ordered by the President is now complete. After evaluating all of the detainees, the review participants have decided on the proper disposition—transfer, prosecution, or continued detention—of all 240 detainees subject to the review.

Each of these decisions was reached by the unanimous agreement of the agencies responsible for the review: the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff.

### **Review Process**

To implement the President's order, the Attorney General, as the coordinator of the review, established the Guantanamo Review Task Force and a senior-level Review Panel. The Task Force was responsible for assembling and examining relevant information on the Guantanamo detainees and making recommendations on their proper dispositions. The Review Panel, consisting of officials with delegated authority from their respective agencies to decide the disposition of each detainee, reviewed the Task Force's recommendations and made disposition decisions on a rolling basis. Where the Review Panel did not reach consensus, or where higher-level review was appropriate, the agency heads ("Principals") named in the Executive Order determined the proper disposition of the detainee.

Key features of the review process included:

- **Comprehensive Interagency Review.** The Task Force consisted of more than 60 career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Central Intelligence Agency, Federal Bureau of Investigation, and other agencies within the intelligence community.
- **Rigorous Examination of Information.** The Task Force assembled large volumes of information from across the government relevant to determining the proper disposition of each detainee. Task Force members examined this information critically, giving careful consideration to the threat posed by the detainee, the reliability of the underlying information, and the interests of national security.

- **Unanimous Decision-Making by Senior Officials.** Based on the Task Force’s evaluations and recommendations, senior officials representing each agency responsible for the review reached unanimous determinations on the appropriate disposition for all detainees. In the large majority of cases, the Review Panel was able to reach a consensus. Where the Review Panel was not able to reach a unanimous decision—or when additional review was appropriate—the Principals met to determine the proper disposition.

### **Results of the Review**

The decisions reached on the 240 detainees subject to the review are as follows:

- **126 detainees** were approved for transfer. To date, 44 of these detainees have been transferred from Guantanamo to countries outside the United States.
- **44 detainees** over the course of the review were referred for prosecution either in federal court or a military commission, and **36 of these detainees** remain the subject of active cases or investigations. The Attorney General has announced that the government will pursue prosecutions against six of these detainees in federal court and will pursue prosecutions against six others in military commissions.
- **48 detainees** were determined to be too dangerous to transfer but not feasible for prosecution. They will remain in detention pursuant to the government’s authority under the Authorization for Use of Military Force passed by Congress in response to the attacks of September 11, 2001. Detainees may challenge the legality of their detention in federal court and will periodically receive further review within the Executive Branch.
- **30 detainees** from Yemen were designated for “conditional” detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.

### **Looking Ahead**

With the completion of the review, an essential component of the effort to close the Guantanamo detention facilities has been accomplished. Beyond the review, additional work remains to be done to implement the review decisions and to resolve other issues relating to detainees. The Task Force has ensured that its analyses of the detainees and the information collected in the course of the review are properly preserved to assist in the resolution of these issues going forward.

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## **I. Introduction**

An essential component of the President's order calling for the closure of the detention facilities at the Guantanamo Bay Naval Base was the initiation of a new and rigorous interagency review of all individuals detained there. The purpose of the review was to collect and examine information from across the government to determine which detainees the United States should transfer or release from custody, prosecute, or otherwise lawfully detain.

This review is now complete. After carefully considering each case, the agencies responsible for the review—the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff—have unanimously agreed on the proper disposition of all 240 detainees subject to the review. While there remain other steps outside the scope of the review that must be taken before the detention facilities at Guantanamo can be closed, the completion of the review fulfills a central element of the President's order.

This report describes the process by which the review was conducted over the past year, the decisions resulting from the review, and the progress made toward implementing those decisions.

## **II. Background**

Following the terrorist attacks of September 11, 2001, the United States was faced with the question of what to do with individuals captured in connection with military operations in Afghanistan or in other counterterrorism operations overseas. Starting in January 2002, the military began transferring a number of these individuals to the detention facilities at Guantanamo. By the end of 2002, 632 detainees had been brought to Guantanamo. In 2003, 117 additional detainees were brought to the base, with 10 more detainees added in 2004, 14 detainees in 2006, five detainees in 2007, and one detainee in 2008. Since 2002, a total of 779 individuals have been detained at Guantanamo in connection with the war against al-Qaida, the Taliban, and associated forces.

From 2002 through 2008, most of the individuals detained at Guantanamo were transferred or released from U.S. custody, with the vast majority being repatriated to their home countries and others resettled in third countries willing to receive them. Of the 779 individuals detained at Guantanamo, approximately 530—almost 70 percent—were transferred or released from U.S. custody prior to 2009. The countries to which these detainees were transferred include Afghanistan, Albania, Algeria, Australia, Bahrain, Bangladesh, Belgium, Bosnia, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Somalia (Somaliland), Spain, Sudan, Sweden, Tajikistan, Tunisia, Turkey, Uganda, the United Arab Emirates, the United Kingdom, and Yemen.

By January 20, 2009, the population of detainees at Guantanamo had been reduced to 242. Of the 242 remaining detainees, 59 had been approved for transfer by the prior administration and were awaiting implementation of their transfers.

### **III. The President's Executive Order**

On January 22, 2009, the President issued an Executive Order requiring the closure of the detention facilities at Guantanamo within one year. Noting the length of the detentions and the significant concerns they had raised both within the United States and internationally, the President determined that the "prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice."

Accordingly, the President ordered the Executive Branch to conduct a prompt and comprehensive interagency review of the factual and legal bases for the continued detention of all individuals remaining at Guantanamo. The President ordered that the review be coordinated by the Attorney General and conducted with the full cooperation and participation of the Secretary of Defense, Secretary of State, Secretary of Homeland Security, Director of National Intelligence, and Chairman of the Joint Chiefs of Staff.

The first task given to the review participants under the Executive Order was to assemble, to the extent reasonably practicable, all information in the possession of the federal government pertaining to any individual then detained at Guantanamo and relevant to determining his proper disposition.

The Executive Order then set forth the following framework for the review participants to follow in determining the disposition of each detainee:

- First, on a rolling basis and as promptly as possible, determine whether it is possible to transfer or release the detainee consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect the detainee's transfer or release;
- Second, with respect to any detainee not approved for transfer or release, determine whether the federal government should seek to prosecute the detainee for any offenses he may have committed, including whether it is feasible to prosecute such individual in a court established pursuant to Article III of the United States Constitution (*i.e.*, federal court); and
- Third, with respect to any detainee whose disposition is not achieved through transfer, release, or prosecution, select other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of the detainee.

The Executive Order further directed that the Secretary of Defense, the Secretary of State, and other review participants work to effect promptly the release or transfer of all individuals for whom release or transfer is possible, and that the Secretary of State expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement the order.

Finally, the Executive Order required that any individuals who remained in detention at Guantanamo at the time of the closure of the detention facilities be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

#### **IV. Implementing the Executive Order: The Guantanamo Review Task Force**

##### **A. Establishment of the Task Force**

To implement the Executive Order, the Attorney General established the Guantanamo Review Task Force and appointed an Executive Director of the Task Force on February 20, 2009. The Task Force was charged with assembling and reviewing relevant information on the Guantanamo detainees and making recommendations to senior-level officials on the proper disposition of each detainee pursuant to the framework set forth in the Executive Order. To ensure that the expertise and perspectives of each participating agency were brought to bear on the review process, the Task Force was established as an interagency entity. Further, to maximize collaboration and exchange of information among Task Force members, all Task Force staff were located together in a secure facility, on a single floor devoted to Task Force work, and connected electronically through a stand-alone classified network.

##### **B. Task Force Structure**

With the assistance of the participating agencies, the Task Force assembled a staff of over 60 career professionals, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Federal Bureau of Investigation, Central Intelligence Agency, and National Counterterrorism Center. Included in this wide range of representatives were senior military officers, federal prosecutors, FBI agents, intelligence analysts and officers, military prosecutors and investigators, national security lawyers, civil litigators, paralegals, and administrative assistants. During their tenure at the Task Force, these staff members worked full-time on the Task Force review.

The Task Force staff was initially organized into two review teams. The transfer team was responsible for evaluating whether detainees could be transferred or released consistent with the national security and foreign policy interests of the United States.<sup>1</sup>

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<sup>1</sup> The term “release” is used to mean release from confinement without the need for continuing security measures in the receiving country, while the term “transfer” is used to mean release from confinement subject to appropriate security measures.

The team primarily evaluated the degree of threat posed by the detainee to U.S. national security, whether the threat could be mitigated through appropriate security measures, and the potential destination countries where it appeared possible to safely transfer the detainee. The transfer team was composed of representatives from each agency listed in the Executive Order.

The prosecution team was responsible for recommending whether the government should seek to prosecute certain detainees in either federal court or the military commission system. The prosecution team was staffed predominantly by experienced federal prosecutors, investigative agents, and criminal appellate specialists from the Department of Justice,<sup>2</sup> as well as military commission prosecutors and investigative agents from the Department of Defense.

The work of the transfer and prosecution teams often overlapped, and the two teams worked in close coordination over the course of the review. As described below, after an initial review of all the detainees, the transfer and prosecution teams merged to conduct a further review of detainees whose cases had been deferred during the initial review.

The interagency makeup of the review teams was designed to ensure that all relevant agency viewpoints—including military, intelligence, homeland security, diplomatic, and law enforcement—were considered in the review process. Thus, proposed recommendations for transfer or continued detention were drafted, reviewed, and vigorously discussed in group deliberations by representatives of each of the participating agencies. After these extensive discussions on each detainee, any dissenting views of the agency representatives were noted in the recommendations or otherwise made known to the Review Panel.

### C. Guantanamo Review Panel

The Task Force's recommendations, which contained detailed classified assessments of each detainee, were submitted on a rolling basis to the interagency Guantanamo Review Panel. The Review Panel was established in February 2009 along with the Task Force and was composed of senior-level officials from each of the agencies identified in the Executive Order.<sup>3</sup> Review Panel members were delegated authority from their respective agency heads (“Principals”) to decide the disposition of each detainee. Review Panel members were also responsible for ensuring that their respective agencies made relevant information in their possession available to the Task Force and

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<sup>2</sup> Specifically, federal prosecutors on the Task Force were drawn from United States Attorneys' Offices in the Southern District of New York, Eastern District of New York, Western District of New York, District of Columbia, Eastern District of Virginia, Central District of California, Northern District of California, and District of Maine, and from the Counterterrorism Section of the National Security Division in the Department of Justice.

<sup>3</sup> Senior officials from the Central Intelligence Agency and Federal Bureau of Investigation also regularly attended the Review Panel meetings to further inform the decision-making process.

provided the Task Force with personnel and other resources necessary for the Task Force to complete its review within the one-year time frame mandated by the President.

Beginning in March 2009, the Review Panel met on a weekly basis to consider the recommendations of the Task Force. The Review Panel made disposition decisions only by unanimous agreement of the agencies identified in the Executive Order. Thus, each of the participating agencies had an equal voice in disposition decisions, and no decisions were made by the Review Panel over the objection of any agency. In the large majority of cases, the Review Panel was able to achieve consensus and reach decisions regarding the detainees considered. When Review Panel members did not reach consensus, or when higher-level review was appropriate, the cases were referred to the Principals for a decision. All of the cases referred to the Principals also ultimately garnered the unanimous agreement of the participating agencies.

Once a final decision was made regarding the disposition of a particular detainee, the decision was passed to the appropriate agencies for implementation. If a detainee was approved for transfer to a foreign country as a result of the review, the Department of State and Department of Defense worked together to make appropriate arrangements to effect the transfer in a manner consistent with the national security and foreign policy interests of the United States, including U.S. policies concerning humane treatment. If a decision was made by the Review Panel for prosecution, the case was referred to the Department of Justice for further investigation and review under a joint protocol established by the Department of Justice and Department of Defense to determine whether to pursue prosecution of the case in federal court or a military commission. The Review Panel was regularly updated on the implementation of transfer decisions and prosecution referrals, as well as any issues arising out of the implementation of these decisions requiring further interagency consideration.

#### **D. Task Force Information Collection**

In accordance with the Executive Order, the Task Force's initial responsibility was to collect all government information, to the extent reasonably practicable, relevant to determining the proper disposition of each detainee. The government did not have a preexisting, consolidated repository of such information. Rather, each federal agency stored information concerning Guantanamo detainees in its own systems, consistent with its particular mission and operating protocols.

Accordingly, soon after it was formed, the Task Force initiated an effort to collect detainee information and make it available for review by Task Force members. As a result of this complex effort, the Task Force consolidated a large volume of information from the Department of Defense, Central Intelligence Agency, Federal Bureau of Investigation, Department of Justice, National Security Agency, National Counterterrorism Center, Department of State, and Department of Homeland Security.

The documents assembled by the Task Force include summaries of biographic and capture information; interrogation reports from custodial interviews of the detainees;

records of Department of Defense administrative proceedings involving the detainees, *i.e.*, Combatant Status Review Tribunals and Administrative Review Board proceedings; the results of name traces run for detainees in certain intelligence databases maintained by the Central Intelligence Agency and National Security Agency; the results of name traces run for detainees in law enforcement databases maintained by the Federal Bureau of Investigation; investigative records maintained by the Office of Military Commissions–Prosecution (“OMC”) and Criminal Investigative Task Force within the Department of Defense; records assembled by the Department of Justice for purposes of defending habeas litigation brought by detainees to challenge their detention; recidivism assessments concerning former detainees; finished intelligence products on the detainee population and on general topics of interest to the Task Force’s work; and information concerning potential destination countries for detainees approved for transfer or release. The Task Force also accepted written submissions made on behalf of individual detainees by their counsel or other representatives.

Additionally, the Task Force had access to a variety of external networks containing additional information on the detainees, including documentary and physical evidence recovered through counterterrorism operations, and records concerning the behavior, disciplinary infractions, and physical and mental health of the detainees during detention. Over the course of the review, the Task Force also received briefings from the intelligence community on a number of topics relevant to the review.

The review of all this information was conducted in a classified environment using secure systems.

#### **E. Review Phases**

Following an initial period to stand up the Task Force and collect detainee information, the Task Force began to review detainees on March 5, 2009. The review was conducted in two phases. During the first phase, the Task Force reviewed all 240 detainees subject to the review.<sup>4</sup> In accordance with the framework set forth in the Executive Order, the purpose of the first phase of the review was to identify those detainees who could be transferred or released consistent with the national security and foreign policy interests of the United States, those detainees as to whom prosecution appeared feasible, and those detainees who required further evaluation before a decision could be made on their appropriate disposition.

The purpose of the second phase of the review was to reevaluate those detainees who had been deferred during the first phase. Each detainee reviewed in the second phase was considered for transfer, prosecution, or—in the event that neither of these dispositions was deemed appropriate—continued detention pursuant to the government’s

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<sup>4</sup> Although there were 242 detainees at Guantanamo when the Executive Order was issued, one detainee had already been convicted and sentenced to life in the military commission system in 2008, and another detainee committed suicide in June 2009. Thus, there were 240 detainees whose dispositions were reviewed under the Executive Order.

authority under the Authorization for Use of Military Force (“AUMF”) passed by Congress in response to the attacks of September 11, 2001.

## **V. Detainee Review Guidelines**

In conducting its reviews, the Task Force followed detainee review guidelines (“Guidelines”) developed specifically for the Executive Order review and approved by the Review Panel. The Guidelines set forth standards to apply in considering detainees for transfer, prosecution, or continued detention pursuant to the government’s authority under the AUMF.

### **A. Transfer Guidelines**

The Guidelines addressed three types of evaluations relevant to determining whether a detainee should be recommended for transfer or release.

The first evaluation required by the Guidelines was a threat evaluation. The Guidelines provided that a detainee should be deemed eligible for transfer if any threat he poses could be sufficiently mitigated through feasible and appropriate security measures.<sup>5</sup> The Guidelines set forth a non-exclusive list of factors to be considered in evaluating the threat posed by a detainee. In applying those factors, the Task Force was instructed to consider the totality of available information regarding the detainee, and to give careful consideration to the credibility and reliability of the available information.

The second evaluation required by the Guidelines was an evaluation of potential destination (*i.e.*, receiving) countries. The Guidelines left the Task Force with discretion whether to recommend a detainee for transfer only to specified countries or under specified conditions. As with the threat evaluation, the Guidelines provided a non-exclusive set of factors by which to evaluate potential receiving countries.

The third evaluation required by the Guidelines was a legal evaluation to ensure that any detainee falling outside the government’s lawful detention authority under the AUMF was recommended for transfer or release.

### **B. Prosecution Guidelines**

The Guidelines also required cases to be evaluated by Task Force prosecutors to determine whether a federal court or military commission prosecution should be recommended for any offenses the detainees may have committed.

For the evaluation of whether a detainee should be prosecuted in federal court, the Guidelines set forth standards used by federal prosecutors across the country to determine

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<sup>5</sup> The Guidelines further provided that a detainee should be deemed eligible for release if he does not pose an identifiable threat to the national security of the United States. Other than the 17 Chinese Uighur detainees, who were approved for “transfer or release,” no detainees were approved for “release” during the course of the review.

whether to charge a case, as set forth in the *United States Attorneys' Manual*. Consistent with these standards, the Guidelines provided that a case should be recommended for prosecution if the detainee's conduct constitutes a federal offense and the potentially available admissible evidence will probably be sufficient to obtain and sustain a conviction—unless prosecution should be declined because no substantial federal interest would be served by prosecution. Key factors in making this determination include the nature and seriousness of the offense; the detainee's culpability in connection with the offense; the detainee's willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the detainee is convicted.

For the evaluation of whether a detainee should be prosecuted in a military commission, Task Force prosecutors examined the potentially available admissible evidence and consulted closely with OMC to determine the feasibility of prosecution.

Recognizing the unique nature of these cases, the Guidelines provided that other factors were also significant in determining whether to recommend prosecution, including the need to protect classified information, such as intelligence sources and methods.

### C. Detention Guidelines

In accordance with the Executive Order, the Guidelines provided that every effort should be made to ensure that all detainees who could be recommended for transfer, release, or prosecution consistent with national security and foreign policy interests and the interests of justice were recommended for such dispositions. Thus, the Guidelines provided that a detainee should be considered eligible for continued detention under the AUMF only if (1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful.

The Guidelines required the Task Force to consult with the Department of Justice in conducting a legal evaluation for each detainee considered for continued detention. This legal evaluation addressed both the legal basis for holding the detainee under the AUMF and the government's case for defending the detention in any habeas litigation.<sup>6</sup>

As the Supreme Court has held, inherent within the authorization of the AUMF to “use all necessary and appropriate force” is the power to detain any individuals who fall within the scope of the statute.<sup>7</sup> As the Court observed, “by universal agreement and

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<sup>6</sup> The AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons.” AUMF § 2(a).

<sup>7</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J.) (dissenting).

practice,” the power to wage war necessarily includes the authority to capture and detain combatants in order to prevent them from “returning to the field of battle and taking up arms once again.”<sup>8</sup> The scope of the AUMF’s detention authority extends to those persons who “planned, authorized or committed or aided” the September 11 attacks, “harbored those responsible for those attacks,” or “were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>9</sup> Accordingly, only detainees who satisfied this standard could be designated for continued detention.

#### **D. Review of Information**

Consistent with the Guidelines’ requirement that the Task Force undertake a fresh and comprehensive evaluation of detainee information, the Task Force sought to make independent evaluations of the facts. In many instances, the Task Force largely agreed with prior threat assessments of the detainees and sometimes found additional information that further substantiated such assessments. In other instances, the Task Force found prior assessments to be overstated. Some assessments, for example, contained allegations that were not supported by the underlying source document upon which they relied. Other assessments contained conclusions that were stated categorically even though derived from uncorroborated statements or raw intelligence reporting of undetermined or questionable reliability. Conversely, in a few cases, the Task Force discovered reliable information indicating that a detainee posed a greater threat in some respects than prior assessments suggested.

Even after careful examination of the intelligence, however, it was not always possible to draw definitive conclusions regarding a detainee’s past conduct. Many of the detainees were captured in active zones of combat and were not previously the targets of investigation by U.S. law enforcement authorities or the intelligence community. Much of what is known about such detainees comes from their own statements or statements made by other detainees during custodial debriefings. The Task Force sought to ensure that the Review Panel and Principals were apprised in their decision-making of any limitations of the available information.

### **VI. Results of the Review**

#### **A. Overview of Decisions**

By the one-year mark of January 22, 2010, the review participants reached decisions on the appropriate disposition of all 240 detainees subject to the Executive Order. In sum, 126 detainees were approved for transfer; 36 detainees were referred for

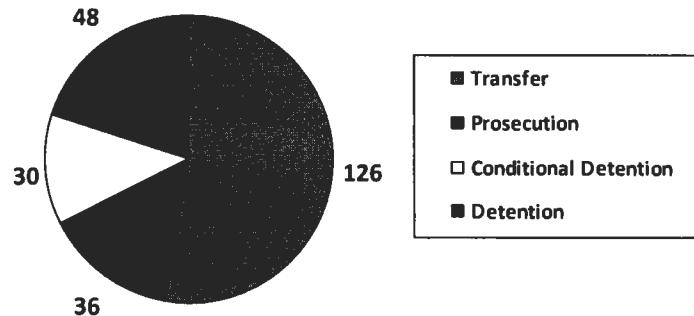
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<sup>8</sup> *Id.* at 518; *see also id.* at 587 (Thomas, J.) (dissenting) (same).

<sup>9</sup> See Gov’t Filing, *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. March 13, 2009). The United States Court of Appeals for the District of Columbia recently affirmed that Guantanamo detainees who meet this standard are detainable. *See also Al-Bihani v. Obama*, --- F.3d ---, 2010 WL 10411 at \*3 (D.C. Cir. Jan. 5, 2010).

prosecution;<sup>10</sup> 48 detainees were approved for continued detention under the AUMF; and 30 detainees from Yemen were approved for “conditional” detention based on present security conditions in Yemen.

### Overview of Decisions



After careful deliberation, all of these decisions were reached by unanimous agreement of senior officials from each agency responsible for the review. Thus, each decision carries the approval of the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. A more detailed breakdown of the decisions follows.

#### Detainees Approved for Transfer

- 126 detainees were unanimously approved for transfer subject to appropriate security measures.
  - 63 of the 126 detainees either had been cleared for transfer by the prior administration, ordered released by a federal district court, or both.
  - 44 of the 126 detainees have been transferred to date—24 to their home countries, 18 to third countries for resettlement, and two to Italy for prosecution.
  - 82 of the 126 detainees remain at Guantanamo. Of these detainees:
    - 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies on humane treatment. The State Department and Department of Defense are working with these countries concerning the security conditions and timing of the

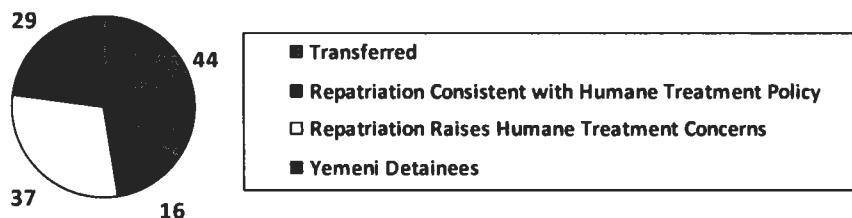
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<sup>10</sup> As explained below, 44 cases were initially referred for prosecution; 36 of those cases remain the subject of active referrals.

transfers. Some of these detainees have obtained injunctions that presently bar their repatriation and cannot be repatriated until these injunctions are lifted; litigation over the injunctions is ongoing.

- 37 cannot be repatriated at this time due to humane treatment or related concerns associated with their home countries (other than Yemen). The State Department is seeking to resettle these detainees in third countries. (A small number of these detainees may be transferred to third countries for prosecution rather than resettlement.)
- 29 are from Yemen. In light of the moratorium on transfers of Guantanamo detainees to Yemen announced by the President on January 5, 2010, these detainees cannot be transferred to Yemen at this time. In the meantime, these detainees are eligible to be transferred to third countries capable of imposing appropriate security measures.

#### **Detainees Approved for Transfer**

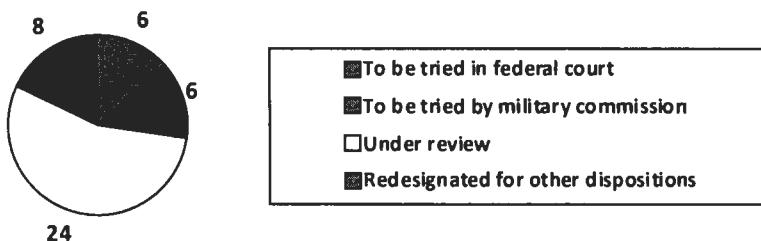


#### Detainees Referred for Prosecution

- Initially, 44 detainees were referred for prosecution. As a result of further evaluation of these cases (detailed below), there are now 36 detainees who remain the subject of active cases or investigations.
  - 1 detainee (Ahmed Ghailani) has been transferred to the Southern District of New York and will be tried for his alleged role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania.
  - 5 detainees will be tried in the Southern District of New York, for their alleged roles in the September 11 attacks, as announced by the Attorney General.
  - 6 detainees will be tried for offenses under the laws of war in a reformed military commission system, as announced by the Attorney General.
  - 24 detainees remain under review pursuant to the joint Department of Justice-Department of Defense protocol. No final determination has yet been made as to whether or in what forum these 24 detainees will be charged.

- 8 other detainees were initially referred for prosecution but subsequently designated for other dispositions.
  - 1 detainee was transferred pursuant to a court order in his habeas case.
  - 7 detainees were referred back to the review participants after prosecution was deemed not feasible upon further evaluation (6 were subsequently approved for continued detention under the AUMF, and 1 was approved for transfer).

#### **Detainees Referred for Prosecution**



#### Detainees Approved for Detention

- 48 detainees were unanimously approved for continued detention under the AUMF based on a finding that they pose a national security threat that could not be mitigated sufficiently at this time if they were to be transferred from U.S. custody.
  - The Task Force concluded as to all of these detainees that prosecution is not feasible at this time in either federal court or the military commission system.
  - At the same time, the Task Force concluded that there is a lawful basis for continuing to detain these detainees under the AUMF.

#### Detainees Approved for Conditional Detention

- 30 detainees from Yemen were unanimously approved for “conditional” detention based on current security conditions in Yemen.
  - After carefully considering the intelligence concerning the security situation in Yemen, and reviewing each detainee on a case-by-case basis, the review participants selected a group of 30 Yemeni detainees who pose a lower threat than the 48 detainees designated for continued detention under the AUMF, but who should not be among the first groups of transfers to Yemen even if the current moratorium on such transfers is lifted.
  - These 30 detainees were approved for “conditional” detention, meaning that they may be transferred if one of the following conditions is satisfied: (1) the

security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available. Should any of these conditions be satisfied, however, the 29 Yemeni detainees approved for transfer would receive priority for any transfer options over the 30 Yemeni detainees approved for conditional detention.

## B. Overview of the Guantanamo Detainee Population

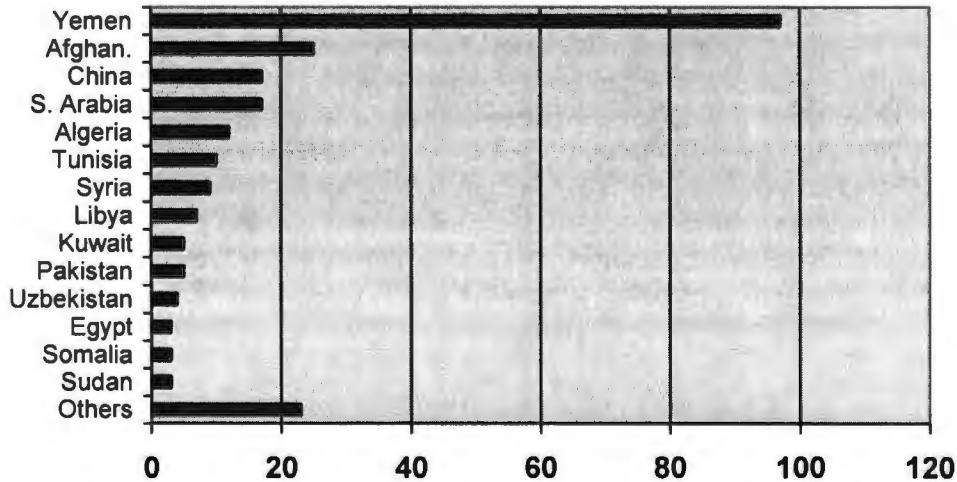
The following section provides an overview of the 240 Guantanamo detainees reviewed under the Executive Order, including their threat characteristics and more general background information, including country of origin, point of capture, and date of arrival at Guantanamo.

***Threat Characteristics.*** As reflected in the decisions made in the review, there is a substantial degree of variation among the Guantanamo detainees from a security perspective. Although not all detainees can be neatly characterized, the following groupings provide a rough overview of the recurring threat profiles seen in the population.

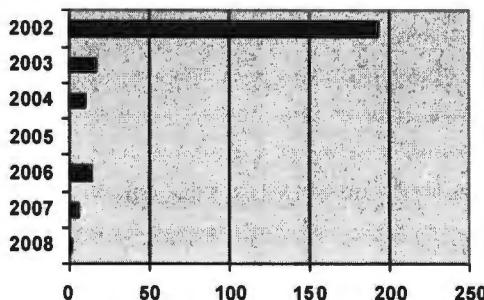
- *Leaders, operatives, and facilitators involved in terrorist plots against U.S. targets.* At the high end of the threat spectrum are leaders, planners, operatives, and facilitators within al-Qaida or associated groups who are directly implicated in terrorist plots against U.S. interests. Among the most notorious examples in this group are Khalid Sheikh Mohammed, the alleged mastermind of the September 11 attacks; Ramzi bin al-Shibh, the alleged principal coordinator of the September 11 attacks; Abd al-Rahim al-Nashiri, the alleged mastermind of the attack on the U.S.S. *Cole*; Abu Faraj al-Libi, who allegedly succeeded Khalid Sheikh Mohammed as al-Qaida's chief planner of terrorist operations; Hambali, the alleged leader of an al-Qaida affiliate in Indonesia who directed numerous attacks against Western targets in Southeast Asia; and Ahmed Ghailani, an alleged key participant in the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Roughly 10 percent of the detainees subject to the review appear to have played a direct role in plotting, executing, or facilitating such attacks.
- *Others with significant organizational roles within al-Qaida or associated terrorist organizations.* Other detainees played significant organizational roles within al-Qaida or associated terrorist organizations, even if they may not have been directly involved in terrorist plots against U.S. targets. This group includes, for example, individuals responsible for overseeing or providing logistical support to al-Qaida's training operations in Afghanistan; facilitators who helped move money and personnel for al-Qaida; a cadre of Usama bin Laden's bodyguards, who held a unique position of trust within al-Qaida; and well-trained operatives who were being groomed by al-Qaida leaders for future terrorist operations. Roughly 20 percent of the detainees subject to the review fall within this category.

- *Taliban leaders and members of anti-Coalition militia groups.* The detainee population also includes a small number of Afghan detainees who occupied significant positions within the Taliban regime, and a small number of other Afghan detainees who were involved in local insurgent networks in Afghanistan implicated in attacks on Coalition forces. Less than 10 percent of the detainees subject to the review fall within this category.
- *Low-level foreign fighters.* A majority of the detainees reviewed appear to have been foreign fighters with varying degrees of connection to al-Qaida, the Taliban, or associated groups, but who lacked a significant leadership or other specialized role. These detainees were typically captured in combat zones during the early stages of U.S. military operations in Afghanistan, often by Northern Alliance troops or other allied forces, without being specifically targeted for capture by (or even known to) the U.S. military in advance. Many were relatively recent recruits to training camps in Afghanistan run by al-Qaida or other groups, where they received limited weapons training, but do not appear to have been among those selected for more advanced training geared toward terrorist operations abroad.
- *Miscellaneous others.* The remaining detainees—roughly 5 percent—do not fit into any of the above categories.

**Country of Origin.** The Guantanamo detainees reviewed included individuals from a number of different countries, including Yemen, Afghanistan, China, Saudi Arabia, Algeria, Tunisia, Syria, Libya, Kuwait, and Pakistan. Approximately 40 percent—97 detainees—were Yemeni, while over 10 percent were Afghan.



**Point of Capture.** The large majority of the detainees in the population reviewed—approximately 60 percent—were captured inside Afghanistan or in the Afghanistan-Pakistan border area. Approximately 30 percent of the detainees were captured inside Pakistan. The remaining 10 percent were captured in countries other than Afghanistan or Pakistan.



**Arrival at Guantanamo.** Most of the detainees reviewed—approximately 80 percent—arrived at Guantanamo in 2002, having been captured during the early months of operations in Afghanistan. The remaining detainees arrived in small numbers over succeeding years.

## VII. Transfer Decisions

### A. Background

As the first step in the review process, the Executive Order required the review participants to determine which Guantanamo detainees could be transferred or released consistent with the national security and foreign policy interests of the United States. The Executive Order further required the Secretary of Defense, the Secretary of State, and other review participants as appropriate, to “work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.”

Prior to the initiation of the review, 59 of the 240 detainees subject to review were approved for transfer or release by the prior administration but remained at Guantanamo by the time the Executive Order was issued. One reason for their continued detention was that more than half of the 59 detainees could not be returned to their home countries consistent with U.S. policy due to post-transfer treatment concerns.<sup>11</sup> Thus, many of the 59 detainees required resettlement in a third country, a process that takes time and requires extensive diplomatic efforts.

In addition, 29 of the detainees subject to review were ordered released by a federal district court as the result of habeas litigation. Of these 29 detainees, 18 were

<sup>11</sup> It is the longstanding policy of the United States not to transfer a person to a country if the United States determines that the person is more likely than not to be tortured upon return or, in appropriate cases, that the person has a well-founded fear of persecution and is entitled to persecution protection. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Protocol Relating to the Status of Refugees. Accordingly, prior to any transfer, the Department of State works closely with relevant agencies to advise on the likelihood of persecution or torture in the given country and the adequacy and credibility of assurances obtained from the foreign government.

ordered released after the government conceded the case.<sup>12</sup> The remaining 11 detainees were ordered released after a court reached the merits of the case and ruled, based on a preponderance of the evidence, that the detainee was not lawfully held because he was not part of, or did not substantially support, al-Qaida, the Taliban, or associated forces.<sup>13</sup> Of the 29 detainees ordered released, 18 were among the 59 who had been approved by the prior administration for transfer or release. Thus, a total of 70 detainees subject to the review were either approved for transfer during the prior administration or ordered released by a federal court.

## B. Decisions

Based on interagency reviews and case-by-case threat evaluations, 126 of the 240 detainees were approved for transfer by agreement of senior officials from the agencies named in the Executive Order.

The 126 detainees unanimously approved for transfer include 44 who have been transferred to date—24 to their home countries,<sup>14</sup> 18 to third countries for resettlement,<sup>15</sup> and two to Italy for prosecution. Of the 82 detainees who remain at Guantanamo and who have been approved for transfer, 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies concerning humane treatment, 38 cannot be repatriated due to humane treatment or related concerns in their home countries (other than Yemen) and thus need to be resettled in a third country, and 29 are from Yemen. Half of all detainees approved for transfer—63 of the 126—also had been approved for transfer during the prior administration, ordered released by a federal court, or both.<sup>16</sup>

There were considerable variations among the detainees approved for transfer. For a small handful of these detainees, there was scant evidence of any involvement with terrorist groups or hostilities against Coalition forces in Afghanistan. However, for most of the detainees approved for transfer, there were varying degrees of evidence indicating that they were low-level foreign fighters affiliated with al-Qaida or other groups operating in Afghanistan. Thousands of such individuals are believed to have passed

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<sup>12</sup> Of the 18 cases conceded by the government, 17 were brought by the Uighur detainees and were conceded by the prior administration. Eleven of the 18 detainees have been transferred to date.

<sup>13</sup> A total of 14 detainees have won their habeas cases on the merits in district court. The government transferred three of these detainees in December 2008; thus, they were not subject to the review. Of the 11 remaining detainees who were reviewed under the Executive Order, seven have been transferred to date. Of the four who have not been transferred, the United States is appealing the district court's ruling in two of the cases, and is still within the time period to appeal the remaining two cases.

<sup>14</sup> The 24 detainees transferred to their home countries were repatriated to Afghanistan (5), Algeria (2), Chad (1), Iraq (1), Kuwait (2), Saudi Arabia (3), Somalia (Somaliland) (2), the United Kingdom (1), and Yemen (7).

<sup>15</sup> The 18 detainees transferred to third countries for resettlement were transferred to Belgium (1), Bermuda (4), France (2), Hungary (1), Ireland (2), Portugal (2), and Palau (6).

<sup>16</sup> The review participants reviewed the detainees who had been approved for transfer by the prior Administration and designated seven such detainees (all of whom were from Yemen) for conditional detention instead of transfer.

through Afghanistan from the mid-1990s through 2001, recruited through networks in various countries in the Middle East, North Africa, and Europe. These individuals varied in their motivations, but they typically sought to obtain military training at one of the many camps operating in Afghanistan; many subsequently headed to the front lines to assist the Taliban in their fight against the Northern Alliance. For the most part, these individuals were uneducated and unskilled. At the camps, they typically received limited weapons training. While al-Qaida used its camps to vet individuals for more advanced training geared toward terrorist operations against civilian targets, only a small percentage of camp attendees were deemed suitable for such operations. The low-level fighters approved for transfer were typically assessed by the review participants not to have been selected for such training. Many were relatively recent recruits to the camps, arriving in Afghanistan in the summer of 2001. After the camps closed in anticipation of the arrival of U.S. forces in October 2001, some of these individuals were transported by camp personnel or otherwise made their way to the Tora Bora mountain range, where they joined fighting units, but subsequently dispersed in the face of U.S. air attacks.

It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. Indeed, all transfer decisions were made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented. Some detainees were approved for transfer only to specific countries or under specific conditions, and a few were approved for transfer only to countries with pending prosecutions against the detainee (or an interest in pursuing a future prosecution). Each decision was made on a case-by-case basis, taking into account all of the information about the detainee and the receiving country's ability to mitigate any threat posed by the detainee. For certain detainees, the review participants considered the availability of rehabilitation programs and mental health treatment in the receiving country. The review participants also were kept informed of intelligence assessments concerning recidivism trends among former detainees.

It is also important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee. To be sure, in some cases the review participants had concerns about the strength of the evidence against a detainee and the government's ability to defend his detention in court, and considered those factors, among others, in deciding whether to approve the detainee for transfer. For many of the detainees approved for transfer, however, the review participants found there to be reliable evidence that the detainee had engaged in conduct providing a lawful basis for his detention. The review participants nonetheless considered these detainees appropriate candidates for transfer from a threat perspective, in light of their limited skills, minor organizational roles, or other factors.

### C. Yemeni Detainees

From the outset of the review, it was clear that the Yemeni detainees posed a unique challenge: there were 97 Yemenis subject to the review, by far the largest group in the Guantanamo population, and the security situation in Yemen had deteriorated. Al-Qaida was gaining strongholds in certain regions of the country, and the government of Yemen was facing a rebellion in other regions. Potential options for rehabilitation programs and other security measures were carefully considered throughout the course of the review, but conditions in Yemen remained a primary concern.

Taking into account the current intelligence regarding conditions in Yemen, and the individual backgrounds of each detainee, the review participants unanimously approved 36 of the 97 Yemeni detainees for transfer subject to appropriate security measures. The decision to approve these detainees for transfer, however, did not require immediate implementation. Rather, by making each transfer decision contingent on the implementation of appropriate security measures, the review participants allowed for necessary flexibility in the timing of these transfers. Under these transfer decisions, detainees would be returned to Yemen only at a time, and only under conditions, deemed appropriate from a security perspective.

To date, only seven of the 36 Yemeni detainees approved for transfer have been transferred to Yemen.<sup>17</sup> One was transferred in September 2009 pursuant to a court order, and six were transferred in December 2009. The six who were repatriated in December 2009 were selected by the unanimous agreement of high-level officials in the agencies named in the Executive Order, after further individualized reviews of the detainees, including consideration of threat-related information, the evidence against the detainees, and the government's ability to successfully defend the lawfulness of their detentions in court. This decision involved high-level coordination within the government and reflected a determination that these six specific detainees should be returned to Yemen at that time.

There are 29 Yemenis approved for transfer who remain at Guantanamo. The involvement of Al-Qaida in the Arabian Peninsula—the branch of al-Qaida based in Yemen—in the recent attempted bombing of an airplane headed to Detroit underscored the continued need for a deliberate approach toward any further effort to repatriate Yemeni detainees. In the wake of the attempted plot, the President publicly announced a moratorium on the transfer of detainees to Yemen. Accordingly, none of the 29 Yemeni detainees remaining at Guantanamo who are approved for transfer will be repatriated to Yemen until the moratorium is lifted. These detainees may be considered for resettlement in third countries subject to appropriate security measures, if such options become available.

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<sup>17</sup> During the last administration, 14 detainees were returned to Yemen, and an additional 15 Yemeni detainees were among the 59 approved for (but still awaiting) transfer as of January 20, 2009.

## VIII. Prosecution Decisions

### A. Background

The Executive Order provides that “[i]n accordance with United States law, the cases of individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution [*i.e.*, federal court].” In a speech at the National Archives on May 21, 2009, the President reiterated that “when feasible, we will try those who have violated American criminal laws in federal courts.” As the President noted in his speech, federal prosecutors have a long history of successfully prosecuting all manner of terrorism offenses in the federal courts:

Our courts and juries of our citizens are tough enough to convict terrorists, and the record makes that clear. Ramzi Yousef tried to blow up the World Trade Center—he was convicted in our courts, and is serving a life sentence in U.S. prison. Zacarias Moussaoui has been identified as the 20<sup>th</sup> 9/11 hijacker—he was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantanamo.

The President also stressed that military commissions “have a history in the United States dating back to George Washington and the Revolutionary War” and remained “an appropriate venue for trying detainees for violations of the laws of war.” Accordingly, the administration proposed, and Congress has since enacted, reforms to the military commissions system to ensure that the commissions are fair, legitimate, and effective.

In accordance with the President’s guidance, the Task Force evaluated detainees for possible prosecution wherever there was any basis to conclude that prosecution in either federal court or a military commission was appropriate and potentially feasible. The Task Force prosecutors focused their review at first on the 23 detainees who, as of the issuance of the Executive Order, were facing charges in the military commissions, as well as several other uncharged detainees whose cases were related to those of charged detainees.<sup>18</sup> The Task Force then evaluated for possible prosecution the approximately 40 additional detainees whom OMC had designated for potential prosecution. Finally, the Task Force reviewed every detainee for prosecution who was deemed ineligible for transfer.

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<sup>18</sup> As of January 22, 2009, there were 12 detainees whose cases had been referred to a military commission, including the defendants in the September 11 prosecution. In compliance with the Executive Order, their cases were halted.

In conducting its reviews, the Task Force worked closely with OMC. Task Force members had access to OMC files, and OMC prosecutors briefed the Task Force on their cases. Upon request, Department of Defense investigators and FBI agents who had worked on investigations met with Task Force members to answer their questions. The Task Force also reviewed original source information pertaining to the detainees and was able to identify previously unexploited sources of evidence.

As the Task Force completed its prosecution reviews, it identified those cases that appeared feasible for prosecution in federal court, or at least potentially feasible, if certain investigative steps were pursued with success. In this regard, the Task Force identified a number of avenues for strengthening important cases and developing them for prosecution. For example, the Task Force determined that there were more than a thousand pieces of potentially relevant physical evidence (including electronic media) seized during raids in the aftermath of the September 11 attacks that had not yet been systematically catalogued and required further evaluation for forensic testing. There were potential cooperating witnesses who could testify against others at trial, and key fact witnesses who needed to be interviewed. Finally, certain foreign governments, which had been reluctant to cooperate with the military commissions, could be approached to determine whether they would provide cooperation in a federal prosecution. Given the limited resources of the Task Force to pursue this additional work, the Review Panel referred cases that appeared potentially feasible for federal prosecution to the Department of Justice for further investigation and prosecutorial review.

The Department of Justice and Department of Defense agreed upon a joint protocol to establish a process for determining whether prosecution of a referred case should be pursued in a federal court or before a military commission. Under the protocol—titled *Determination of Guantanamo Cases Referred for Prosecution*—there is a presumption that prosecution will be pursued in a federal court wherever feasible, unless other compelling factors make it more appropriate to pursue prosecution before a military commission. The evaluations called for under the protocol are conducted by teams of both federal and military prosecutors. Among the criteria they apply are: the nature of the offenses to be charged; the identity of the victims; the location of the crime; the context in which the defendant was apprehended; and the manner in which the case was investigated and by which investigative agency. The Attorney General, in consultation with the Secretary of Defense, makes the ultimate decision as to where a prosecution will be pursued.

## B. Decisions

As a result of the Task Force's review, the Review Panel referred 44 cases to the Department of Justice for potential prosecution and a decision regarding the forum for any prosecution.<sup>19</sup> Decisions to seek prosecution have been announced in 12 of these cases; 24 remain pending under the protocol; and eight of the detainees initially referred were subsequently designated for other dispositions.

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<sup>19</sup> The review participants did not determine that any additional detainees were potentially feasible for prosecution solely before a military commission at this time.

On May 21, 2009, the Department of Justice announced that Ahmed Ghailani, who had previously been indicted in the United States District Court for the Southern District of New York for his alleged role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania, would be prosecuted in federal court.<sup>20</sup> On June 9, 2009, Ghailani was transferred from Guantanamo to the Southern District of New York, where his case is pending.

On November 13, 2009, the Attorney General announced that the government would pursue prosecution in federal court in the Southern District of New York against the five detainees who had previously been charged before a military commission for their roles in the September 11 attacks. They are:

- Khalid Sheikh Mohammed, the alleged mastermind of the September 11 plot;
- Ramzi bin al-Shibh, the alleged coordinator of the September 11 plot who acted as intermediary between Khalid Sheikh Mohammed and the hijackers in the United States;
- Walid Muhammed Salih Mubarak Bin Attash (a.k.a. Khallad Bin Attash), an alleged early member of the September 11 plot who tested airline security on United Airlines flights between Bangkok and Hong Kong;
- Mustafa Ahmed al-Hawsawi, an alleged facilitator of hijackers and money to the United States from his base in Dubai; and
- Ali Abdul Aziz Ali (a.k.a. Ammar Baluchi), a second alleged facilitator of hijackers and money to the United States from his base in Dubai.

On the same day, the Attorney General also announced that the prosecution against Abd al-Rahim al-Nashiri, the alleged mastermind of the bombing of the U.S.S. *Cole*, would be pursued before a military commission. The Attorney General further decided that four other detainees whose cases were pending before military commissions when the Executive Order was issued would remain before the commissions: Ahmed al-Darbi, Noor Uthman, Omar Khadr, and Ibrahim al-Qosi. In January 2010, the Department of Justice announced that Obaidullah, whom OMC had charged but whose case had not yet been referred to a military commission, will remain in the military commission system.

Twenty-four of the referred cases remain pending with the Department of Justice under the protocol. No final decision has been made regarding whether or in what forum these detainees will be prosecuted.

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<sup>20</sup> The decision to pursue prosecution against Ghailani in federal court was made before the joint prosecution protocol was in effect.

Eight of the referred detainees are no longer under active consideration for prosecution. One detainee who had been referred for prosecution was transferred pursuant to a court order in his habeas case. Seven additional detainees who had been referred for prosecution were ultimately referred back to the Task Force, based on a determination that the cases were not feasible for prosecution in either federal court or the military commission system at this time. Six of these detainees were subsequently approved for continued detention under the AUMF without criminal charges, and one was approved for transfer. As a result of these subsequent decisions, there are currently 36 cases with active prosecution referrals.

### C. Detainees Who Cannot Be Prosecuted

The Task Force concluded that for many detainees at Guantanamo, prosecution is not feasible in either federal court or a military commission. There are several reasons for these conclusions.

First, the vast majority of the detainees were captured in active zones of combat in Afghanistan or the Pakistani border regions. The focus at the time of their capture was the gathering of intelligence and their removal from the fight. They were not the subjects of formal criminal investigations, and evidence was neither gathered nor preserved with an eye toward prosecuting them. While the intelligence about them may be accurate and reliable, that intelligence, for various reasons, may not be admissible evidence or sufficient to satisfy a criminal burden of proof in either a military commission or federal court. One common problem is that, for many of the detainees, there are no witnesses who are available to testify in any proceeding against them.

Second, many of the detainees cannot be prosecuted because of jurisdictional limitations. In many cases, even though the Task Force found evidence that a detainee was lawfully detainable as part of al-Qaida—*e.g.*, based on information that he attended a training camp, or played some role in the hierarchy of the organization—the Task Force did not find evidence that the detainee participated in a specific terrorist plot. The lack of such evidence can pose obstacles to pursuing a prosecution in either federal court or a military commission. While the federal material support statutes have been used to convict persons who have merely provided services to a terrorist organization, *e.g.*, by attending a terrorist training camp, there are potential limitations to pursuing such a charge against the detainees.<sup>21</sup>

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<sup>21</sup> Among these limitations: First, the two relevant statutes—18 U.S.C. §§ 2339A and 2339B—were not amended to expressly apply extraterritorially to non-U.S. persons until October 2001 and December 2004, respectively. Thus, material support may not be available as a charge in the federal system unless there is sufficient evidence to prove that a detainee was supporting al-Qaida after October 2001 at the earliest. Second, the statute of limitations for these offenses is typically eight years (*see* 18 U.S.C. § 3286), which may bar prosecution for offenses that occurred well before the detainee's capture. Third, because the statutory maximum sentence for material support is 15 years (where death does not result from the offense), sentencing considerations may weigh against pursuing prosecution in certain cases. Some of these considerations would not apply to material support charges brought in the military commissions; however, the legal viability of material support as a charge in the military commission system has been challenged on appeal in commission proceedings.

Notably, the principal obstacles to prosecution in the cases deemed infeasible by the Task Force typically did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted. While such concerns were present in some cases, most detainees were deemed infeasible for prosecution based on more fundamental evidentiary and jurisdictional limitations tied to the demands of a criminal forum, as described above.

Significantly, the Executive Order does not preclude the government from prosecuting at a later date someone who is presently designated for continued detention. Work on these cases continues. Further exploitation of the forensic evidence could strengthen the prosecution against some detainees. Other detainees may cooperate with prosecutors. If either the Department of Justice or the Department of Defense concludes in the future that prosecution of a detainee held without charges has become feasible in federal court or in a military commission, the detention decisions made in the course of this review would permit the prosecution to go forward.

## **IX. Detention Decisions**

### **A. Background**

Under the Executive Order, the review participants were required first to consider whether it was possible to transfer, release, or prosecute each detainee. With respect to any detainees who were not deemed appropriate for transfer, release, or prosecution, the review participants were required to “select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.”

In accordance with this framework, detainees were first reviewed to determine whether transfer or release was consistent with the national security and foreign policy interests of the United States and whether they could be prosecuted. If those options did not appear feasible, the review participants then considered whether the detainee’s national security threat justified continued detention under the AUMF without criminal charges, and, if so, whether the detainee met the legal requirements for detention.

### **B. Decisions**

As the result of this review, 48 detainees were unanimously approved for continued detention under the AUMF.

Although each detainee presented unique issues, all of the detainees ultimately designated for continued detention satisfied three core criteria: First, the totality of available information—including credible information that might not be admissible in a criminal prosecution—indicated that the detainee poses a high level of threat that cannot be mitigated sufficiently except through continued detention; second, prosecution of the detainee in a federal criminal court or a military commission did not appear feasible; and third, notwithstanding the infeasibility of criminal prosecution, there is a lawful basis for the detainee’s detention under the AUMF.

Broadly speaking, the detainees designated for continued detention were characterized by one or more of the following factors:

- **Significant organizational role within al-Qaida, the Taliban, or associated forces.** In contrast to the majority of detainees held at Guantanamo, many of the detainees approved for detention held a leadership or other specialized role within al-Qaida, the Taliban, or associated forces. Some provided operational, logistical, financial, or fundraising support for al-Qaida. Others were al-Qaida members who were selected to serve as bodyguards for Usama bin Laden based on their loyalty to the organization. Others were Taliban military commanders or senior officials, or played significant roles in insurgent groups in Afghanistan allied with the Taliban, such as Hezb-e-Islami Gulbuddin.
- **Advanced training or experience.** The detainees approved for detention tended to have more extensive training or combat experience than those approved for transfer. Some of these detainees were veteran *jihadists* with lengthy involvement in the training camps in Afghanistan. Several had expertise in explosives or other tactics geared toward terrorist operations.
- **Expressed recidivist intent.** Some detainees designated for detention have, while at Guantanamo, expressly stated or otherwise exhibited an intent to reengage in extremist activity upon release.
- **History of associations with extremist activity.** Some of the detainees approved for detention have a history of engaging in extremist activities or particularly strong ties (either directly or through family members) to extremist organizations.

*Lawful basis for detention.* Under the Executive Order, every detainee's disposition must be lawful. Accordingly, the Task Force consulted closely with the Department of Justice regarding every detainee approved for continued detention to ensure that the detainee fell within the bounds of the Government's detention authority under the AUMF, as described above.

*Prosecution not currently feasible.* Although dangerous and lawfully held, the detainees designated for detention currently cannot be prosecuted in either a federal court or a military commission. While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee's guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee's conduct does not constitute a chargeable offense in either a federal court or military commission. Though prosecution currently is not feasible for these detainees, designating a detainee for detention does not preclude future prosecution in either a federal court or a military commission should new evidence or other developments make a prosecution viable.

*Transfer or release not currently feasible.* Finally, none of the detainees approved for detention can be safely transferred to a third country at this time. This does

not mean that the detainee could never be safely transferred to a third country. Rather, designating the detainee for continued detention at this time indicates only that given the detainee's current threat and the current willingness or ability of potential destination countries to mitigate the threat, the detainee is not currently eligible for transfer or release. Should circumstances change (e.g., should potential receiving countries implement appropriate security measures), transfer might be appropriate in the future.

### C. Continued Reviews

Detainees approved for continued detention under the AUMF will be subject to further reviews. First, in accordance with the Supreme Court's decision in *Boumediene v. Bush*,<sup>22</sup> each detainee has the opportunity to seek judicial review of their detention by filing a petition for a writ of habeas corpus in federal court. In such cases, the court reviews whether the detainee falls within the government's lawful detention authority. In cases where courts have concluded that the detainee is not lawfully held, the courts have issued orders requiring the government to take diplomatic steps to achieve the detainee's release. Thus far, federal district courts have ruled on cases brought by four of the 48 detainees approved for continued detention. In each of the four cases, the district court denied the habeas petition and upheld the lawfulness of the detention. Many other cases are pending in district court, and some are pending on appeal.

Second, as the President stated in his speech at the National Archives, "a thorough process of periodic review" is needed to ensure that "any prolonged detention is carefully evaluated and justified." Thus, in addition to the judicial review afforded through habeas litigation, each detainee approved for continued detention will be subject to periodic Executive Branch review.

### X. Conditional Detention Decisions: Yemeni Detainees

As discussed above, the review of the 97 Yemeni detainees posed particular challenges from the outset given the security situation in Yemen. After conducting a case-by-case review of the Yemeni detainees, the review participants unanimously agreed that 36 Yemenis (29 of whom remain at Guantanamo) are appropriate for transfer, subject to security measures, and that 26 Yemenis should continue to be detained under the AUMF in light of their individual threat. In addition, there are currently five Yemenis with active prosecution referrals, two of whom the Attorney General announced will be prosecuted in federal court for their roles in the September 11 attacks (Ramzi bin al-Shibh and Walid Muhammed Salih Mubarak Bin Attash).

The remaining 30 Yemeni detainees were determined to pose a lower threat than the group of detainees designated for continued detention under the AUMF. Nonetheless, the review participants determined, based on a number of factors, that these 30 detainees should not be transferred to Yemen in the near future and should not be among the first groups of transfers to Yemen even if the current moratorium on such transfers is lifted.

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<sup>22</sup> 122 S. Ct. 2229 (2008).

Thus, these 30 detainees were approved for “conditional” detention, meaning that they may be transferred if one of the following conditions is satisfied: (1) the security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available. Should any of these conditions be satisfied, however, the remaining 29 Yemeni detainees approved for transfer would receive priority for any transfer options over the 30 Yemeni detainees approved for conditional detention.<sup>23</sup>

At the time of the closure of the detention facilities at Guantanamo, the status of detainees approved for conditional detention will be reconsidered for possible transfer to Yemen, a third country, or a detention facility in the United States.

## XI. Diplomatic Efforts

The President’s Executive Order recognized that diplomatic efforts would be essential to the review and appropriate disposition of individuals detained at Guantanamo. To implement the review decisions approving the transfer of detainees, the order provides that the “Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.” The President emphasized this point during his speech at the National Archives, stating that for cases involving “detainees who we have determined can be transferred safely to another country . . . my Administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil.”

To fulfill this mission, the Secretary of State created an office to lead the diplomatic efforts to transfer detainees and appointed an experienced career diplomat to serve as the Special Envoy for the Closure of the Guantanamo Bay Detention Facilities. The highest levels in the administration supported these efforts. The President, Vice President, and Cabinet members—including the Secretary of State, Attorney General, and Secretary for Homeland Security—have discussed the closure of the Guantanamo detention facilities and the transfer of detainees outside the United States with their foreign government counterparts. To assist these diplomatic efforts, the National Counterterrorism Center facilitated the sharing of information about the detainees with foreign governments considering whether to accept them. In addition, the government arranged meetings between officials from interested countries and detainees at Guantanamo to facilitate resettlement and repatriation discussions.

From the outset of the review, the State Department developed a diplomatic strategy for Guantanamo, focusing on efforts to resettle detainees who could not be sent to their home countries because of post-transfer treatment concerns. In June 2009, the United States and European Union concluded a joint statement in support of the

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<sup>23</sup> Ten of the detainees approved for conditional detention had initially been approved for transfer by the review participants. Because the specific conditions placed on the transfer approvals of these 10 detainees were the equivalent of those used for the conditional detention category, the 10 detainees were later redesignated for conditional detention.

resettlement of a number of detainees in Europe, expressing the readiness of certain member states to resettle former Guantanamo detainees on a case-by-case basis. Following this joint statement, a number of European governments—such as Spain, Italy, Portugal, and Ireland—announced that they were prepared to work out arrangements to accept some detainees. In addition, the Government of Palau also announced its readiness to accept a number of Uighur detainees. Following these initial successes, the State Department intensified efforts to implement resettlements. The public offers by some European governments to resettle detainees encouraged other governments to make similar offers.

To date, the diplomatic efforts taken under the Executive Order have led to the resettlement of 18 detainees in the following seven locations: Belgium, Bermuda, France, Hungary, Ireland, Palau, and Portugal.<sup>24</sup> Resettlement negotiations are ongoing with a number of countries, *e.g.*, Spain, Switzerland, and Slovakia. In addition, Italy accepted two detainees for criminal prosecution on charges stemming from pre-9/11 activities. All efforts to resettle detainees include discussions with receiving governments about post-transfer security measures, as well as other issues such as the integration and humane treatment of resettled detainees.

The process for engaging a country on resettlement issues can be lengthy and complicated. The State Department has engaged in discussions with dozens of countries across the globe to initiate or further resettlement negotiations once it has been determined that a government is open to discussions. When this process is successful, initial receptiveness leads to discussions regarding individual detainees, foreign government interagency review, foreign government interviews of prospective resettlement candidates, the foreign government's formal decision-making process, integration plans, and, ultimately, resettlement. The length of the effort often has been influenced by political and other issues in potential resettlement countries (*e.g.*, public perceptions of current and past U.S. detention policies), third-country views (and sometimes pressure) with respect to detainee resettlement, and public views of the Guantanamo detention facility generally. Depending on how these factors affect individual cases, the process can be very lengthy.

Once a resettlement has occurred, the State Department and other agencies remain in contact with host governments following transfer on these issues. The State Department is engaged in ongoing discussions for the remaining detainees who cannot be repatriated due to post-transfer treatment concerns and is on track to find resettlement countries for most if not all of the detainees in this category.

The State Department also has worked to repatriate detainees to their home countries, in coordination with other agencies and with the National Security Council. Thus far, 24 detainees have been repatriated since last January to nine different locations—Afghanistan, Algeria, Chad, Iraq, Kuwait, Saudi Arabia, Somaliland, the United Kingdom, and Yemen. All decisions to repatriate detainees have been made in

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<sup>24</sup> From 2002-2008, a total of eight Guantanamo detainees were resettled, all in Albania.

light of the latest intelligence information and with the consent of all relevant agencies. In light of such information, and following the attempted terrorist attack on December 25, 2009, the President announced that repatriations to Yemen would be suspended for the foreseeable future. In addition, the government has adopted enhanced procedures for the implementation of repatriation decisions, requiring a cabinet-level review prior to going forward with any repatriation.

## **XII. Conclusion**

The review process established pursuant to the Executive Order is now complete. The participating agencies have reviewed and unanimously agreed on dispositions for each of the 240 detainees subject to the review. The agencies responsible for the review will continue to handle operational issues involving detainees, including the implementation of the review determinations, and the National Security Council will coordinate the resolution of policy issues pertaining to Guantanamo. The Task Force has ensured that its analyses of the detainees and the information collected in the course of the review are properly preserved to assist in the resolution of these issues going forward.